76

(3)

No. 07-321

FILED
DEC 19 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

RICHARD I. BERGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

BRAD D. BRIAN
MICHAEL R. DOYEN*
BRUCE A. ABBOTT
AARON M. MAY
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100

Counsel for Petitioner

* *Counsel of Record*

REPLY BRIEF IN SUPPORT OF PETITION

In opposing certiorari in this case, the Government conspicuously does *not* dispute that the circuits are in disarray over the important question presented here—whether a deprivation of the right to counsel during a critical phase of a criminal trial is subject to automatic reversal.[1] Instead, the Government's *sole* point in opposition is its assertion that the question presented was neither pressed by Petitioner below nor passed on by the Court of Appeals. Br. in Opp. at 10. The Government's argument, however, is flatly belied by the record and opinion below, which confirm that the issue was squarely presented to, and decided by, the Court of Appeals. Because the Government otherwise does

---

[1] Nor could it. The issue has now been pressed and passed upon by every Circuit with criminal jurisdiction. In the proceedings below, the Ninth Circuit expressly held that, although Petitioner was deprived of his right to have counsel present during a critical phase of his trial, Pet. App. at 27a, "[s]uch an error ... is *not* a basis for *automatic reversal*." *Id.* at 28a (emphasis added). As explained in the Petition, *see* Pet. at 8-13, that holding directly conflicts with the decisions of the First, Second, Fifth, Sixth, Eighth and Eleventh circuits, which hold that such an error requires automatic reversal. *French v. Jones*, 332 F.3d 430, 436, 438 (6th Cir. 2003); *Curtis v. Duval*, 124 F.3d 1, 4-5 (1st Cir. 1997); *Norde v. Keane*, 294 F.3d 401, 413 (2d Cir. 2002); *Burdine v. Johnson*, 262 F.3d 336, 344-45 (5th Cir. 2001) (en banc); *United States v. White*, 341 F.3d 673, 677-78 (8th Cir. 2003); *United States v. Arbolaez*, 450 F.3d 1283, 1295 (11th Cir. 2006); *see also United States v. Hamilton*, 391 F.3d 1066, 1070 (9th Cir. 2004) ("absence of counsel" during suppression hearing was "'structural defect' to which no harmless-error analysis can be applied."). It also conflicts with holdings of the D.C., Third, Fourth, Seventh, and Tenth Circuits, which hold such an error requires reversal at least where (as here) it "affected and contaminated the entire criminal proceeding." *United States v. Klat*, 156 F.3d 1258, 1264 (D.C. Cir. 1998); *see also Henderson v. Frank*, 155 F.3d 159, 171 (3d Cir. 1998); *United States v. Owen*, 407 F.3d 222, 227 (4th Cir. 2005); *Sanders v. Lane*, 861 F.2d 1033, 1040 (7th Cir. 1988); *United States v. Lott*, 433 F.3d 718, 723 (10th Cir. 2006).

not contest the obvious certworthiness of the question presented, the Petition should be granted.

On its face, the Court of Appeals' opinion in this case explicitly reaches and decides the question presented. Although it held that the trial court's *ex parte* remarks to a potentially deadlocked jury were a critical stage of the proceedings; that the remarks were made outside the presence of Petitioner *and his counsel*; and that Petitioner had not waived the right to have counsel present for these remarks, Pet. App. at 27a - 29a, the Court of Appeals expressly *rejected* the contention that this error, without more, required automatic reversal:

> Such an error, however, is *not a basis for automatic reversal*. If an *ex parte* communication "rises to the level of a constitutional violation, then the burden is on the prosecution to prove that the error was *harmless beyond a reasonable doubt*."

Id. at 28a (citing *United States v. Rosales-Rodriguez,* 289 F.3d 1106, 1109 (9th Cir. 2002)) (emphasis added). That the Ninth Circuit reached and decided the issue is alone sufficient to bring the issue before this Court. *See United States v. Williams*, 504 U.S. 36, 41 (1992) (rule requiring that question presented be pressed or passed upon below "operates ... in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon . . ."); *see also, e.g., Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n. 8 (1991) (reaching issue not pressed below because court below had passed upon it nevertheless).

The Government wrongly suggests that the Ninth Circuit may not have passed upon the question presented, because the panel's precise wording did not explicitly use the phrase "Sixth Amendment" in rejecting automatic reversal despite the absence of counsel during a critical stage. Br. in Opp. at 9. This is wrong. The Ninth Circuit's discussion below refers interchangeably (and expressly) *both* to the deprivation

of the defendant's right to be present *and* the defendant's *right to have counsel present* at critical phases. Pet. App. at 27a (noting defense claim that Berger's rights were violated "when the judge made the challenged informal comments to the jury outside the presence of Berger and his counsel"); *id.* at 29a ("delivery of a supplemental jury instruction is a 'critical' stage of a trial that requires a defendant's or defense counsel's presence"); *id.* ("Our case law is clear that communication between the judge and jury outside of counsel's presence, without a proper waiver, violates a defendant's right to due process of law"). That is understandable, because—in conflict with every other circuit—the Ninth Circuit has consistently treated the right to a defendant's presence and the right to counsel during jury instructions as subject to the *same* harmless-error standard of review. Pet. App. at 27a-29a; *Rosales-Rodriguez*, 289 F.3d at 1109-10. Far from rendering the case an inadequate vehicle, the Ninth Circuit's persistence below in equating the standards of review for the two rights *reinforces and illustrates* the very three-way split that is presented for this Court's resolution.[2]

Although it is sufficient that the Ninth Circuit *passed* upon the question presented, *Williams*, 504 U.S. at 41, the Government is also flatly wrong in arguing that Petitioner did

---

[2] To the extent that the Government's argument is intended more narrowly to focus on the absence of the exact words "Sixth Amendment" in the relevant section of the opinion below (as opposed to the *substance* of the Ninth Circuit's ruling), this Court's review cannot be avoided by such wordplay. Because Petitioner squarely invoked both his Fifth and Sixth Amendment rights at all stages below, *see, e.g.*, Petitioner's Ct. of App. Opening Br. at 1-2, 5, 21, there can be no doubt that the Ninth Circuit's discussion of the "right to counsel" also rests on the Sixth Amendment. *See, e.g., Ballard v. U.S.*, 152 F.2d 941, 943 (9th Cir. 1946), *reversed on unrelated grounds*, 329 U.S. 187 (1946) ("The Chief Justice, with his concurring associates, in voting to affirm the conviction, necessarily considered and passed upon every issue raised upon appeal.").

not press below the contention that the absence of counsel required an automatic reversal. The Government makes much of the fact that, in his briefs before the Ninth Circuit *panel*, Petitioner acknowledged the fact that the Ninth Circuit, in *Rosales-Rodriguez*, had *already held* that the violation of the right to counsel during the giving of supplemental jury instructions was subject to harmless error review. But the Government pointedly overlooks what else Petitioner said in his briefs to the panel below: Petitioner explicitly invoked his Sixth Amendment right to counsel and argued that *the absence of counsel itself*, without more, during a critical stage of the proceedings, constituted the requisite "prejudice requiring reversal." *See* Petitioner's Ct. App. Opening Br. at 25. Thus, Petitioner contended that, to the extent that the Ninth Circuit persisted in applying a "harmless error" standard (as required by *Rosales-Rodriguez*), it should hold that the complete absence of counsel at a critical stage was *per se* harmful. The panel recognized that argument for precisely what it was, and expressly rejected Petitioner's contention that automatic reversal was required. Pet. App. at 27a, 28a; *see also supra* at 2.

Thereafter, Petitioner again pressed his automatic-reversal argument before the *en banc* court, this time without the complication of trying to reconcile it with the prior panel decision in *Rosales-Rodriguez*; instead, Petitioner forthrightly petitioned the *en banc* court to follow the majority of the other Circuits. *See, e.g.*, Ct. App. Pet. for Rehearing En Banc at 1-2, 7-8, 10-14. That alone provides an alternative basis for why the question raised in the Petition is properly presented for this Court's resolution.[3]

---

[3] *See, e.g., Rummel v. Estelle*, 445 U.S. 263, 267 n. 7 (1980) (considering argument, "raised ... for the first time in his [petitioner's] petition to the Court of Appeals for rehearing en banc"); *Erckman v. United States*, 416 U.S. 909, 912 n.1 (1974) (considering argument raised "at the first

Because the question presented is properly and squarely before this Court, and because the Government otherwise does not contest its obvious importance and certworthiness, this Court should grant the petition.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BRAD D. BRIAN
MICHAEL R. DOYEN*
BRUCE A. ABBOTT
AARON M. MAY
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue
Los Angeles, CA 90071
(213) 683-9100

Counsel for Petitioner
*Counsel of Record

December 10, 2007

---

opportunity, in his petition for rehearing in the Court of Appeals"); *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U.S. 682, 687 (1947) (considering argument "raised . . . for the first time in [petitioner's] petition for rehearing in the Circuit Court of Appeals").